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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF *AMICUS CURIAE* JOHNSON & HIGGINS IN SUPPORT OF APPELLANT

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INTEREST OF *AMICUS CURIAE*

Johnson & Higgins is one of the largest insurance brokers in the United States.[1] Its clients are businesses, associations and government entities that are insured or self-insured against property and casualty claims. Both Johnson & Higgins and its clients have a vital interest in the maintenance of a healthy insurance and risk financing system in this country.

The key to having adequate insurance made available to the American public at affordable, reasonable costs is

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[1] The consents of Appellant and Appellee for the filing of this brief are on file with the Clerk of the Court.

predictability. Predictability, in turn, is dependent upon a stable legal system where those who must make decisions on whether to act or how to act, and those who must decide whether to insure and if so at what price, can do so with fairly accurate knowledge of the likely legal consequences. This foreseeability of legal consequences is one of the most important elements in predicting economic consequences. Insurers' and self-insurers' decisions are based on estimates as to the probabilities of loss occurring and the potential range of such losses.

While the judge-made common law has always been in an evolutionary process of change, this change traditionally occurred only in small increments. Thus it was possible for insurers to bracket the range in which changes might occur, and thus still assess overall risk with some degree of accuracy.

This country is now in the midst of what the Government has characterized as the "Insurance Availability/ Affordability Crisis."[2] One of the causes of the current crisis is the growth in both the number and size of punitive damage awards. While most insurance policies do not insure against such awards, the growing threat of such awards has now become a major source of uncertainty in litigation involving claims that are within the scope of existing policies. Not only does the presence of punitive claims increase the costs of defense under such policies, but they also make settlements more difficult or impossible.

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[2] *Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability.* This interagency working group consisted of representatives of ten federal agencies and the White House. The primary contributing agencies included the Department of Justice, the Department of Commerce, and the Small Business Administration. The Report was dated February 1986 and was made public in late March.

A principal obstacle to fair settlements is that in many jurisdictions, like that below, there is no effective constraint on the size of such awards. There the only standard for settlement is sheer speculation as to what a jury may or may not award.[3] The arguments in this brief demonstrate why judges have an obligation under the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to limit such awards that are so disproportionate that they constitute excessive punishment. Articulation of that principle in this case will go far to restore both fairness and predictability to our legal system.

SUMMARY OF ARGUMENT

As a matter of common sense, it seems obvious that an award of punitive damages should bear some reasonable relation to the nature of the misconduct. Yet current practice allows imposition of punitive damages in amounts grossly disproportionate to any legitimate basis for punishment. Such awards not only offend common sense; they also violate the Eighth and Fourteenth Amendments to the Constitution of the United States.

ARGUMENT

I. PUNITIVE DAMAGES ARE PUNISHMENT.

The starting point is recognition that punitive damages are a form of punishment. The Supreme Court of Mississippi admitted as much when it said that punitive damages are designed "to punish defendant and to provide a substantial deterrent to it and others similarly situated . . . ." App. A. at 50a. In other words, punitive damages serve purposes of retribution (repaying injury with injury) and deterrence, which are tradi-

[3] Thus, even if settlements are made in the face of such uncertainties, punitive damages claims often have an unjust, coercive effect.

tional rationales for punishment. They serve no other purpose. *See Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979) ("Retribution and deterrence are not legitimate nonpunitive governmental objectives."). Thus, punitive damages are a form of punishment and must be justified on that ground.

All this would be too obvious for mention were it not for the persistent misapprehension that *civil* sanctions somehow cannot count as punishment. This assumption is obviously wrong, and perhaps for that reason it is rarely defended. Nonetheless, the assumption that civil penalties are not really punishment pervades the debates over punitive damages. Some such assumption necessarily underlies the contention that constitutional scrutiny should be strictly confined to *criminal* sanctions.

But punishment does not necessarily become less harmful or less coercive simply because it is labeled "civil." The distinction between civil and criminal punishments is often a matter of form. Especially is this so where the defendant is a business entity and thus beyond the reach of the distinctively penal sanction of imprisonment. In the context of business entities, there is little real difference between civil and criminal regimes of regulation—both involve the use of pecuniary sanctions.[4]

Thus, the important functional distinction is not between civil and criminal punishment, but between compensation and punishment. Compensation involves the *allocation* of loss; punishment is the *creation* of loss. It is an intentional infliction of harm by the state. No society founded on the principle of limiting state power

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[4] This is not to deny, however, that there can be substantial adverse consequences, both in public image and indirect economic losses, that follow from this stigma of conduct labeled criminal. But that distinction is not relevant here.

can tolerate unconstrained punishment. And that is true whether the punishment is denominated civil or criminal. The potential abuses are the same.

It is not necessary to say punitive damages "are" criminal sanctions or that the law must treat them identically. One need not go so far. The important point here is that punitive damages are a form of punishment. The constitutional concerns that appropriately attend the infliction of punishment are not obviated by the label "civil." More extended analysis is required.

II. GROSSLY DISPROPORTIONATE PUNISHMENT IS UNCONSTITUTIONAL.

A fundamental constitutional principle is that punishment not be excessive—that is, that it not be grossly disproportionate to the nature of the misconduct. This principle is accepted in the criminal law, *see Solem v. Helm*, 463 U.S. 277 (1983), but there has been resistance to its application beyond that context. *See Ingraham v. Wright*, 430 U.S. 651, 664-68 (1977).[5]

It is plain that the constitutional protection against excessive punishment is not concerned solely with criminal laws. Such a limitation would be unsupported by the text of the relevant constitutional provisions, inconsistent with the history underlying those provisions, and contrary to the fundamental purpose to protect life, liberty and property from arbitrary deprivation.

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[5] Note, however, that the *Ingraham* Court was careful not to state categorically that the various provisions of the Eighth Amendment could have no application outside the criminal context. Instead, the *Ingraham* Court merely adhered to the traditional focus of cruel-and-unusual-punishment cases and ruled that the Eighth Amendment did not apply to the paddling of school children. 430 U.S. at 671. That result is not drawn in question here.

Note also that the *Ingraham* Court explicitly contemplated that some punishments might be treated as criminal even though not so labeled. *Id.* at 669 n.37. That recognition disproves any intent to limit Eighth Amendment principles strictly to criminal sanctions.

A. Text.

The relevant constitutional texts are the Due Process Clause of the Fourteenth Amendment and the Excessive Fines Clause of the Eighth Amendment. Neither is limited to the criminal law.

The Due Process Clause states broadly: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const., amend. XIV, § 2. It contains no hint of limitation to the criminal law and has never been so construed.

The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The reference to "bail" evokes the criminal law, but neither "fines" nor "punishments" are necessarily criminal. Moreover, the absence of limiting language in the Eighth Amendment stands in telling contrast to other Bill of Rights provisions. The Fifth Amendment states that "No person shall be held to answer for a capital, or otherwise infamous *crime*" without indictment by grand jury, and that no person shall "for the same *offence* . . . be twice put in jeopardy of life or limb; nor shall be compelled in any *criminal* case to be a witness against himself. . . ." U.S. Const., amend. V (emphasis added). The Sixth Amendment similarly specifies rights applicable to "all *criminal* prosecutions." U.S. Const., amend. VI (emphasis added). The Eighth Amendment, by contrast, speaks to the severity of punishment rather than to its characterization. There is no textual warrant for limiting this guarantee to the criminal law.

B. History.

The pre-constitutional history of the protection against disproportionate punishment was summarized in *Solem v. Helm*, 463 U.S. at 284-86, and has been elaborated

elsewhere. *See, e.g.*, Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 154-57 (1986). In brief, it is the history of amercements—fines paid to the King to restore wrongdoers to the protection of the law. In Norman England, amercement was the usual penalty for a very broad range of delicts and offenses. These fines were assessed ad hoc and in potentially unlimited amounts. The resulting abuses led to inclusion in Magna Carta of three chapters devoted to the limitation of amercements. Chapter 20 provides in part: "A freeman shall not be amerced for a slight offense, except in accordance with the degree of the offense; and for a grave offense he shall be amerced in accordance with the gravity of the offense. . . ."[6] Here is an early and plain statement of the principle that financial punishment not be disproportionately severe.

As this Court acknowledged in *Solem*, the link between these provisions of Magna Carta and our Bill of Rights is direct and clear. 463 U.S. at 284-86. The protection against excessive amercements was carried forward in the First Statute of Westminster, 3 Edw. 1, ch. 6 (1275), and in the "excessive Fines" language of the English Bill of Rights, 1 Wm. & Mary sess. 2, ch. 2 (1689). *Id.* at 285. The language of the latter was used by George Mason in Art. I, § 9 of the Virginia Declaration of Rights (1776), which formed the basis for the Eighth Amendment. Moreover, and independently of the Eighth Amendment, the Due Process Clause of the Fifth Amendment has long been held to incorporate the fundamental liberties and protections secured by Magna

[6] W. McKechnie, *Magna Carta, A Commentary on the Great Chapter of King John*, 285 (2d rev. ed. 1914). The remainder of Chapter 20 extends the protection to merchants and villeins. Nobles and clergy are covered by Chapters 21 and 22, respectively. Thus Magna Carta's protection against excessive amercements extended to all segments of society.

Carta. *See, e.g., Murray's Lessee v. Hoboken Land & Improv. Co.*, 59 U.S. (18 How.) 272, 276 (1855). Among those guarantees was the protection against excessive punishments.

C. Constitutional Purpose.

The lesson from text and history is amply confirmed by analysis of the purposes of these provisions. First, there can be no doubt that punitive damages are functionally civil fines. Like other fines, punitive awards impose monetary penalties on particularized assessments of fault. That the penalties are paid to private plaintiffs rather than to the state itself does not matter, for the Eighth Amendment was plainly intended to forbid excessive punishment, not government self-enrichment.

Moreover, there is nothing in logic or policy to suggest that the ban against excessive fines has particular application to the criminal law. The magnitude of punishment inflicted by a fine is chiefly a function of amount, not characterization. A civil fine can be every bit as "excessive" as a criminal fine, and should be equally objectionable.

Finally, it is important to recognize that the evil of excessive or disproportionate punishment is intimately related to the problem of arbitrary or standardless punishment. Although conceivable, it is very unlikely that any penalty specified by the legislature for across-the-board application would be unconstitutionally disproportionate. For one thing, the legislative judgment would itself be an important datum indicating an appropriate sanction. Moreover, the generality and impersonality with which legislative judgments are expressed would likely preclude gross excess.[7]

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[7] In some circumstances, however, the usual constraints of political accountability may fall short of protecting minority interests—a fact that the Framers recognized in the detailed articulation of constitutional restrictions on majority rule.

The evil of unconstitutionally excessive punishment is far more likely to arise where the penalty is assessed ad hoc. The lack of intelligible standards permitting disciplined comparison with other cases invites inconsistency and arbitrariness. Perhaps more importantly, the fact-specific context in which the penalty judgment is made increases the risk that reason will be inflamed by prejudice or derailed by caprice. This destructive synergy between arbitrariness and excess was part of the problem with amercements, as it is part of the problem with punitive damages. In both contexts, the prospect of excessive punishment is exacerbated by the ad hoc manner of its assessment.[8]

III. THIS PUNITIVE AWARD IS THEREFORE UNCONSTITUTIONAL.

The critical question therefore becomes: How does one determine that a given punitive award is grossly disproportionate and therefore unconstitutional? Of course, there is no constitutional requirement that a penalty match precisely some sort of ideal standard; there is only a limitation at the outer edge of reasonableness. Still, the question arises: How does one assess whether a given award has crossed that line?

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[8] The excessiveness of large punitive awards against corporate defendants is further exacerbated by the fact that the penalty is ultimately paid by innocent shareholders rather than by individual wrongdoers, if any, in the corporate hierarchy. In an analogous context, this Court held that punitive damages should not be assessed against municipalities sued under § 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981). The *Newport* Court carefully analyzed the effects of punitive damages against institutional defendants, and concluded that the purposes of retribution and deterrence are in any event better served by suits against responsible individuals rather than against their institutional employers. The reasoning of *Newport* is directly applicable here, and its confirms the folly of allowing arbitrarily large punitive awards against corporate shareholders.

Obviously, there is no self-executing test, but neither are the courts without meaningful guidance. In *Solem*, 463 U.S. at 290-92, this Court identified three objective criteria for assessing disproportionality in the criminal context. These criteria are not uniformly applicable here, but they do suggest analogous guidelines for the control of punitive damages in civil cases.

The first and most important of the *Solem* Court's criteria is the relation between the gravity of the offense and the harshness of the penalty. *See Solem*, 463 U.S. at 290-91. This must be the lodestar for determining the limits of an acceptable punitive award. Fortunately, in the context of punitive damages, this concept of a relation between the gravity of misconduct and the harshness of the penalty has a nearly exact meaning. That meaning derives from the relatively common statutory pattern of imposing treble damages for civil misconduct. *See* 15 U.S.C. § 15a (1982) (antitrust); 18 U.S.C. § 1964(c) (1982) (RICO).[9] The fact that legislatures, when faced with the analogous question of fixing appropriate penalties, so often choose a multiple of three suggests that figure as a sensible norm.

One need not go so far as to contend that nothing higher than three times compensatory damages can ever be sustained. The critical point is to recognize the utility of treble damages as a kind of benchmark. On the facts of this case, that criterion is dispositive. This is not a case involving a purpose to hurt, where a greater penalty might be justified. The punitive award entered here was not three times the compensatory judgment, but 80 times the compensatory judgment. On no account can so extravagant a penalty be maintained.

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[9] *See also*, 2 F. Pollock & F. Maitland, *The History of English Law* (2d ed. 1909), where it is noted that "under Edward I a favourite device of our legislators is that of giving double or treble damages to 'the party grieved'." *Id.* at 522.

The second *Solem* criterion requires comparison with sentences imposed on other criminals in the same jurisdiction. *See Solem*, 463 U.S. at 291. In the civil context, this factor suggests comparison of a punitive damages award with the level of fines authorized by the legislature as criminal penalties. The legislative specification of a permissible sanction when crime is proved should limit the permissible punishment when it is not. That a jury, instructed to seek a mere preponderance of the evidence, can impose a penalty greater than that which the legislature has authorized for proof beyond a reasonable doubt is surely wrong. Quite arguably, the maximum fine authorized as a criminal sanction in a given jurisdiction should place an absolute limit on punitive awards for analogous misconduct. At the very least, the criminal penalty provides a meaningful benchmark against which punitive awards can be measured.

The third *Solem* criterion concerns sentences authorized for the same crime in other jurisdictions. *See Solem*, 463 U.S. at 291. In the context of punitive damages, this translates as a directive that punitive awards be compared to criminal fines in other jurisdictions, as well as in the forum. This factor broadens the inquiry somewhat but does not change its essential focus.

Under these three criteria, there can be no serious question that the punitive award sustained below is grossly excessive. Significantly, the majority below did not disagree. Rather than rely on the *Solem* criteria of disproportionality, the court below justified the award solely and exclusively on a factor having no analogue in *Solem* —the defendant's net worth. Because the punitive award was less than one percent of defendant's net worth, the majority concluded that the award could not "be said to shock the judicial conscience." App. at 52a.

This approach is wholly misguided. If Appellant is to be punished, it should be punished for the harm it caused,

not for the fact of being large. Status crimes have no place in the law, *Robinson v. California*, 370 U.S. 660 (1962), and neither does the defendant's status have any legitimate role in the award of punitive damages.

The usual justification for taking defendant's size into account is that it takes a big award to make a big defendant hurt. While this sort of talk has some superficial plausibility, it wholly misconceives the nature of the proportionality inquiry and its relation to the rule of law. In a nation governed by the rule of law, punishment must be predicated on specific misconduct. Put another way, the rule of law requires that citizens be punished only for what they do, not for who they are.

Requiring that the penalties not be grossly disproportionate to proved misconduct is one way of ensuring that the punishment is in fact based on specific misconduct and not on the defendant's identity or on some other extraneous or illegitimate factor. Thus, basing a huge punitive award solely on the defendant's net worth is directly destructive of the values that the constitutional constraints on severity of punishment are designed to serve.

Moreover, there is neither a retributive nor deterrent rationale for this approach. The fact that given misconduct is committed by a large corporation does not make it more harmful than the same misconduct committed by a small corporation or by an individual. Nor is a larger penalty necessary for purposes of deterrence. As a moment's reflection reveals, the size of the penalty needed for deterrence is determined by reference to the expected gain from the specific misconduct, not by reference to the defendant's other resources. To put the point simply, a penalty sufficient to make the expected cost exceed the expected gain will function as a deterrent. That will be true regardless of the actor's wealth, for a rich man is no more likely than a poor one to engage in misconduct

where the expected cost exceeds the expected gain. Whatever the appropriate sanction for purposes of deterrence, there is *nothing* in deterrence theory to support a larger fine for larger defendants.

The true reason for imposing a huge penalty on a large corporation, however, probably has nothing to do with specific misconduct. It likely results from the speculation that a large corporation has engaged in a *pattern* of misconduct, of which any given case is merely illustrative. If this assumption were proved, it would make good sense to heap up the penalties, for the punitive award would then redress a history of repetitive misbehavior rather than isolated misconduct.[10] The trouble is that here (and in most cases) no such pattern has been *proved* in a court of law. The speculation that a large defendant must have engaged in a large number of transgressions is just that—speculation. It is not supported by the evidence nor by any finding whatever.[11]

If the rule of law means anything at all, it surely must mean that punishment cannot be based on mere speculation. It must be grounded in proof of specific misconduct. It is by reference to that specific misconduct that the proportionality of punishment must be judged. Where the legislature has not acted to define the outer bound of pro-

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[10] But even in that circumstance, care would have to be taken to see that any such single award or multiple punitive damages awards do not have the effect of preventing satisfaction of valid claims by others for compensatory damages.

[11] Relying on a wholly unsubstantiated suspicion that a large defendant has engaged in a large pattern of misconduct is rather like convicting a criminal defendant based on the fact of repeated arrest. If a prosecutor were allowed to tell the jury of an accused's arrest record, the jury might well infer fire from smoke. For that very reason, the prosecutor is barred from such tactics. Similarly, a corporate defendant in a punitive damages case should not be subjected to huge penalties based on mere suspicion. Punishment should be confined to misconduct as proved in a court of law.

portionality, due process and the Eighth Amendment obligate judges to define those outer bounds where necessary to prevent arbitrary punishment. On these facts, there can be little doubt that the punitive award of $1,600,000 added to a compensatory judgment of only $20,000 is grossly disproportionate and hence unconstitutional.

CONCLUSION

For the reasons stated above, the judgment of the Mississippi Supreme Court should be reversed.

Respectfully submitted,

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